SUPREME COURT, U. S.

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No. 955

In the

Supreme Court of the United States

OCTOBER TERM, 1967.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, a corporation,

Petitioner,

vs.

JOSEPH DEL RASO, HORACE SYBERT, QUINTEN BENSON and LUDWIG DALPIAZ,

Respondents.

Petition for Certiorari to the Appellate Court of Illinois for the First Judicial District.

PETITION FOR CERTIORARI

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PETITION FOR CERTIORARI

Petitioner Elgin, Joliet and Eastern Railway Company prays that a writ of certiorari issue to review the majority opinion and judgment of the Appellate Court of Illinois in this cause, and respectfully shows the court:

OPINIONS BELOW

The majority opinion (App. 1a-27a) of the Appellate Court of Illinois for the First Judicial District is reported at 84 Ill. App. 2d 344, 228 N.E. 2d 470, and the dissenting opinion (App. 27a-42a) of the Appellate Court at 84 Ill. App. 2d 344, 374, 228 N.E. 2d 476, 485. The

denial of the petition for leave to appeal by the Supreme Court of Illinois is reported, without opinion, at 37 Ill. 2d 585.

JURISDICTION

The judgment of the Appellate Court of Illinois was entered June 16, 1967. (App. 42a.) On September 26, 1967, the Supreme Court of Illinois denied leave to appeal (App. 43a) requested under Illinois Supreme Court Rule 315, and the judgment of the Appellate Court thereupon became the final judgment of the highest court of the state in which a decision could be had. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157; 160; *Hammerstein* v. *Superior Court*, 341 U.S. 491, 492; *American Railway Express Co.* v. *Levee*, 263 U.S. 19, 20-21. The jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

In an action for personal injuries under the Federal Employer's Liability Act,

1. Whether the courts below erred in withdrawing the issue of contributory negligence from the jury when the standard of contributory negligence is the same as that of negligence under the FELA.
2. Whether the courts below applied the rule of *Urie* v. *Thompson*, 337 U.S. 163, establishing the plaintiff's burden of proof of the railroad's knowledge of an occupational hazard in an FELA occupational disease case.
3. Whether the courts below applied the FELA principles of negligence even-handedly to both plaintiffs and defendant.

STATUTE INVOLVED

Section 3 of the Federal Employer's Liability Act (35 Stat. 66, 45 U.S.C. §53) provides:

> "In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

STATEMENT OF THE CASE

Summary Of Proceedings Below

This is an action under the Federal Employers' Liability Act (45 U.S.C. §§51 *et seq.*) for lead poisoning alleged to have been sustained by the respondents while burning off rivet heads in the course of stripping gondola cars at petitioner's East Joliet, Illinois, yard. The case was tried in the Circuit Court of Cook County, Illinois before a judge and a jury which returned separate verdicts in favor of each petitioner, assessing Del Raso's damages at $14,500.00, Dalpiaz's at $12,500.00, Sybert's at $8,000.00 and Benson's at $3,000.00. (R. Abst. 24-25)* Judgments

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* The printed abstract of the record used in the courts below is included in the record here (along with the original record below); record references in this petition will be to printed abstract and will be cited "R.Abst."

were entered on the verdicts. (R. Abst. 25) Respondent's motions for judgments notwithstanding the verdict or, in the alternative, for new trial (R. Abst. 25) were denied. (R. Abst. 29)

Respondent appealed from the judgments and from the order denying its motions after verdict (R. Abst. 30) to the Appellate Court of Illinois for the First Judicial District. The case was argued orally in the Appellate Court on May 4, 1966. On June 16, 1967, thirteen months later, a majority opinion by McCormick, J., Drucker, J., concurring, was filed affirming the judgment below; English, P. J., filed a dissent, disagreeing with the majority on all issues of liability. No petition for rehearing was filed. Respondent's petition for a certificate of importance was denied July 25, 1967. Respondent's petition for leave to appeal from the Appellate Court's decision was denied by the Supreme Court of Illinois September 26, 1967.

Summary of The Facts

In the late summer or fall of 1955, the four respondents started to work as "burners," using acetylene torches to cut the sides and floors of steel gondola cars from the trucks. The work was done in the open air at petitioner's yard at East Joliet. In burning the rivet heads, "fumes" and "black smoke" was given off, and breathed by the men. Beginning in October 1955, they began to suffer nausea, stomach cramps, and weakness. The doctors to whom they went as private patients did not diagnose their condition as lead poisoning until laboratory tests during Del Raso's hospitalization in late December, 1955. After treatment provided by petitioner, all four men returned to regular railroad work, but not as burners; all were working regularly for petitioner at the time of

trial. None had had any treatment or taken any medication for lead poisoning since 1957.

The 31,000-series of gondola cars which the men were "stripping" in the fall of 1955 had been purchased by petitioner from the Mt. Vernon Car Manufacturing Company in 1937. There was no evidence that petitioner had any actual knowledge that the orange-colored base paint (which was covered by an outer coat of black paint) contained lead, as the subsequent tests in 1956 revealed. Some of the respondents testified that they had complained to their foreman (who died prior to trial) that "smoke or paint or something made them sick" (R. Abst. 38, 39, 56); there is no evidence that they told the foreman, or that he knew anything about the "orange" paint on the cars. Respondents' expert witness testified that "Not all paint contains red lead. Not all orange paint contains red lead" but that he "would guess that there was a greater likelihood that railroad cars painted in 1937 had some red lead" than cars painted later. (R. Abst. 105-6) Respondents' witness Johnson testified that in his forty-four years of experience in the work of stripping cars with acetylene torches, there had never been any case of lead poisoning until these cases in 1955 and 1956. (R. Abst. 95) Dr. Arthur Meadows, petitioner's industrial physician at Joliet since December 1945, had never had any cases of lead poisoning in petitioner's car shops except these cases in 1955 and 1956 (R. Abst. 69-71)

Each of the respondents had sufficient seniority to transfer to work in the car shops away from the stripping job (R. Abst. 122) but none did so until after diagnosis and treatment for lead poisoning. Del Raso lost 9-5/7 weeks from work, or 50 working days; his wage loss at $2.13 an hour as $852.00, his unpaid medical expense, $185.00. (R. Abst. 32, 92, 115) Dalpiaz lost 28 working days;

his wage loss was $477.12, his doctor bill $160.00. (R. Abst. 58, 116) Sybert lost 31 working days; his wage loss was $528.24, his medical expense $110.00. (R. Abst. 76, 116) Benson's wage loss was about $375.00, his doctor bill $40.00 (R. Abst. 42, 116)

How The Federal Questions Were Raised

Over petitioner's specific objection (R. Abst. 141) the trial court gave respondents' instruction No. 17 (R. Abst. 16):

> "The evidence in this case fails to show contributory negligence on the part of any of the plaintiffs, and, therefore you should not consider the question of contributory negligence raised by the defendant."

Respondents withdrew their tendered instructions Nos. 16, 18, and 23 with respect to the burden of proof on, and the effect of, contributory negligence. (R. Abst. 23, 24, 143) Petitioner's tendered instructions Nos. 2, 3, 4, 5 and 10, defining contributory negligence' and the duty of each respondent to exercise reasonable care for his own safety, and stating the effect of the failure to exercise such care (R. Abst. 18, 19) were refused (R. Abst. 143-4) and the court deleted the issue of contributory negligence from respondents' instruction No. 11 relating to the issues, giving the modified instruction as court's instruction No. 1 (R. Abst. 10, 21-2, 142) over petitioner's objection (R. Abst. 142). The error in thus withdrawing the issue of contributory negligence was assigned as grounds for new trial in paragraphs 4 and 5 of the alternative motion for new trial. (R. Abst. 27-8). The issue was preserved and passed on by the Appellate Court decision of which review is sought. (App. 19a-25a, 33a-41a.)

The trial court also refused petitioner's instruction 9 (R. Abst. 20, 144) regarding respondents' burden of proof of the railroad's knowledge in an FELA occupational disease case, and denied petitioner's motion for directed verdict. (R. Abst. 10, 25). The error in refusing the instruction and denying the motion for directed verdict was preserved in petitioner's post trial motions (R. Abst. 28), and the issue was presented and passed on by the Appellate Court below. (App. 2a-19a, 28a-37a)

The issues thus raised arise under the Federal Employer's Liability Act (45 U.S.C. §51 *et seq.*), and involve questions as to the denial of petitioner's rights under Federal law.

ARGUMENT

I. The majority opinion below fails to follow the Federal rule as to the quantum of evidence requiring submission of contributory negligence to the jury.

The majority opinion below gave nothing but lip service to the controlling Federal rule that "only where there is a complete absence of probative facts may the issue of negligence or contributory negligence be taken from the jury." It is no longer open to doubt that in an FELA action, the issues of negligence and contributory negligence are to be tested by a single standard. The same slight quantum of evidence which takes the issue of an FELA defendant's negligence to the jury will take the plaintiff's contributory negligence to the jury. *Wilkerson* v. *McCarthy*, 337 U.S. 163, 178; *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, 506; *Ganotis* v. *New York Central R. Co.*, (2 Cir.) 342 F. 2d 767; *Page* v. *St. Louis Southwestern Ry. So.*, (5 Cir.) 349 F. 2d 820; and see *Gulf, C. & S.F. Ry. Co.* v. *McClelland*, (5 Cir.) 355 F. 2d 196, at 198, calling the attention of the court below, on re-

mand, to "the single standard of causation to be applied to both negligence and contributory negligence" in an FELA dermatitis case.

Decisions to the same effect are *Justice* v. *Pennsylvania R. Co.*, 41 Ill. App. 2d 352, 357, 191 N.E. 2d 72, 74; *Adair* v. *Northern Pacific Ry. Co.*, (Wash.) 392 P. 2d 830; *Marty* v. *Erie R. Co.*, 62 N.J. Super. 458, 163 A. 2d 167; *Daulton* v. *Southern Pacific Co.*, (9 Cir.) 237 F. 2d 710; *Southern Ry. Co.* v. *Cabe*, 109 Ga. App. 432, 136 S.E. 2d 438. Even *Mumma* v. *Reading Co.*, (E.D. Pa.) 247 F. Supp. 252, upon which the majority opinion heavily relies, states and enforces the rule, 247 F. Supp. at 254.

Measured by the Federal standard, the evidence here of respondents' contributory negligence was more than ample to compel submission of that issue to the jury. Here the respondents had *actual* knowledge of what they claim the defendant *should* have known. They knew of the orange base paint; they called it "lead." They knew of the "fumes" and "black smoke" given off in the burning operation; they thought "the smoke or paint or something" caused the cramps, nausea, and weakness of which they complained. Each had sufficient seniority to transfer to a job in the car shops, where there were no burning operations; each refused to do so until his return to work after treatment for his lead poisoning. As they built their case against the petitioner on the issue of negligence, the respondents built the petitioner's limited defense of contributory negligence.

Because of the statutory FELA requirement (45 U.S.C. §53) that contributory negligence must be weighed by the jury as comparative negligence only, it is peculiarly inappropriate to take the issue entirely away from the jury. There is no need under the FELA to bend the legal rules

on contributory negligence because of possible harshness in their application, such as might occur under the common law rule. Under the FELA the jury's broad province resolves such supposed problems naturally, through the vehicle of the jury's collective values and experience, without any occasion for the intervention of a judicial double standard in applying the statutory rules of law.

The majority opinion seeks to excuse its failure to apply the controlling Federal rule by asserting that plaintiffs' failure to transfer back to a job in the car shop and away from the conditions which they believed caused their ill-being was "assumption of risk," not contributory negligence. But *Crowley* v. *Elgin, Joliet & Eastern Ry. Co.*, 1 Ill. App. 2d 481, 506, 117 N.E. 2d 843, 854, holds this is contributory negligence. So does *Koshorek* v. *Pennsylvania Ry. Co.*, (3 Cir.) 318 F. 2d 364, at 369:

> "Koshorek testified that the air in the shop contained dust and it follows that he either knew or should have known that inhalation of excessive dust over an extended period of time might cause him harm. Because of this the jury reasonably could have believed or inferred that he himself was responsible for the harm that befell him."

The controlling Federal standard cannot be avoided by any semantics about assumption of risk.

II. The majority opinion below is in conflict with the URIE *decision on the issues of negligence.*

The landmark case of *Urie* v. *Thompson*, 337 U.S. 163, settles the requirements of plaintiffs' burden of proof in an FELA-occupational disease case. Plaintiffs have the burden of proving that the defendant knew, or by the exercise of reasonable care should have known, that the material upon or with which an employee was working

contained a dangerous amount of toxic or harmful ingredients. 337 U.S. at 177. An Illinois decision, *Crowley* v. *Elgin, Joliet & Eastern Ry.*, 1 Ill. App. 2d 481, 117 N.E. 2d 843, decided by the Appellate Court for the First Judicial District, follows and applies the *Urie* rule, and expressly approves an instruction as to plaintiffs' burden of proof under *Urie*. 1 Ill. App. 2d at 501, 117 N.E. 2d at 853.

1. Even if the evidence is barely sufficient to take to the jury the issue of defendant's knowledge of the presence of lead paint on the cars (which we dispute under point 2 immediately below), defendant was entitled to have the jury instructed as to the *Urie* standard. In *Crowley*, the Appellate Court approved (1 Ill. App. 2d at 503-504, 117 N.E. 2d at 853) the submission of this very issue by the following instruction:

> "You are instructed that the burden is upon each of the plaintiffs to prove by the preponderance or greater weight of the evidence that prior to the time he contracted his dermatitis the defendant had actual knowledge, or in the exercise of reasonable care would have known that that plaintiff, or any other empolyee similarly employed, was reasonably likely to contract a dermatitis from such contact as he might reasonably be expected to have with the oils used on and about the diesel locomotives. If any plaintiff has failed to sustain such burden of proof, you must find the defendant not guilty as to that plaintiff."

Here the Appellate Court approved the trial court's refusal of defendant's instruction No. 9 (R. Abst. 20, 144):

> "The burden is upon each of the plaintiffs to prove by the preponderance or greater weight of the evidence that prior to the time he contracted lead poisoning the defendant had actual knowledge, or in the

exercise of reasonable care should have known that the cars upon which such plaintiff was engaged in burning, or some of them, had been painted with a substance containing lead in such quantities that such plaintiff, or any other employee similarly engaged, was reasonably likely to contract lead poisoning while burning or stripping such car or cars. If any plaintiff has failed to sustain such burden of proof, your verdict must be for the defendant and against such plaintiff."

The Appellate Court majority simply vitiates the rule of law settled by this court in *Urie*. Under the instructions here, who knows what the jury may have found with respect to the FELA knowledge requirement laid down in *Urie*. To function meaningfully as the final arbiters in finding the facts, the jury must be intelligibly instructed as to the applicable law. Otherwise, how can the jury know what findings they must make. How can the jury fulfill their responsibility unless they know what factual issues are relevant under the governing law.

2. The majority opinion below holds that the defendant railroad, through its agents, had actual or constructive knowledge that there was a hazard to plaintiffs health inasmuch as there was "evidence" that 1) defendant was given notice that there was lead paint on the 31,000 series cars; 2) the defendant was also given notice that plaintiffs were suffering from some occupational hazard connected with the burning job; 3) it is common knowledge that the fumes from burning paint often carry noxious gases which can, through constant exposure, cause illness; and 4) the employer is presumed to know the nature of the materials it places in its employees' hands. The dissenting opinion demolishes these contentions.

First, there was no evidence that any employee of the defendant other than the plaintiffs knew of the orange

base paint below the black outercoating. But, according to plaintiffs' expert, "Not all paint contains red lead. Not all orange paint contains red lead." (R. Abst. 103) Dr. Meadows' testimony that "the use of lead base paint was discontinued 25 years or more ago * * * back in the '30's somewhere" (R. Abst. 73) does not permit the inference that all cars painted more than exactly 25 years before the trial below were painted with lead base paint. Defendant's 44 years of lead-free stripping of cars (R. Abst. 95), Dr. Meadows' 20 years of experience of no lead poisoning cases on the EJ&E, other than these in 1955 and 1956 (R. Abst. 69, 71) when the 31,000-series were being stripped, refutes any such inference. Plaintiffs' expert "*guess* that there was a greater *likelihood* that railroad cars painted in 1937 had some red lead than railroad cars that were painted later." (R. Abst. 105) A "guess" as to a likelihood" is too speculative and conjectural to sustain any inference, under the Illinois law of evidence. *Crane Co.* v. *Industrial Commission,* 306 Ill. 56, at 61, 137 N.E. 437, at 439.

Plaintiffs may have called the orange paint "lead paint" among themselves; there is no evidence whatever that they mentioned "lead paint' or "orange paint" to their foreman. Telling their foreman that "I am not feeling very good lately" (R. Abst 38) or "there is something bothering me; I'm sick all the time" (R. Abst. 56) which they attributed to "the smoke or paint or something" (R. Abst. 38, 56) does not charge the foreman, a layman, with knowledge that they were suffering from lead poisoning; the doctors themselves did not recognize the symptoms as lead poisoning until laboratory tests of Del Raso.

Finally, as the dissenting opinion points out, under Illinois evidence law the court cannot take judiical notice that it "is common knowledge that fumes from burning

paint often carry noxious and toxic gases which can through constant exposure cause illness," *222 E. Chestnut St. Corp.* v. *Bd. of Appeals,* 14 Ill. 2d 190, 193-194, 152 N.E. 2d 465, 467; only burning paint containing lead can cause lead poisoning. The plaintiffs have wholly failed to "shoulder the burden of proving [defendant's] knowledge" of the presence of lead paint on the 31,000-series cars, within the standard set forth in *Urie.*

CONCLUSION

The court below has decided substantial issues of federal law, arising under the Federal Employer's Liability Act, in a way not in accord with the decisions of this Court, and in a manner inconsistent with the FELA. We respectfully submit that a writ of certiorari should issue to review the decision of the Appellate Court of Illinois.

Respectfully submitted,

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